IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Second Appeal No.1064 of 2004
With
Civil Application No.880 of 2002

Chandu Dada Mulani, since deceased
through his Legal heirs & representatives
1. Gulmohman Chand Mulani & ors. Appellants

Vs.

Hasan Dada Mulani since deceased
through is LRs. & ors. Respondents

Mr.Dilip Bodake for appellants.
Mr.Milind Deshmukh for resp.nos. 1-A to 1-E.

CORAM: B.H.MARLAPALLE, J.

April 17, 2007.

P.C.

. Heard. Admit.

. Leave to delete respondent no.2 - org. defendant no.2. Amendment to be carried out forthwith. Mr.Deshmukh waives service for respondent nos. 1-A to 1-E.

. By consent the appeal is taken up for hearing forthwith.

. This Second Appeal filed by the defendant no.1 arises from the decree passed by the lower Appellate

Court on 5/5/2001 in Regular Civil Appeal No.630 of 1994.

. Regular Civil Suit No.191 of 1986 came to be filed by the present respondent no.1 for partition and separate possession of his 1/3rd share of the suit properties mentioned in para 1A of the plaint and the suit properties are Devasthan Inam lands Class III and ancestral properties of the plaintiff and defendants. The plaintiff submitted that he and defendant nos.1 and 2 were three brothers and defendant no.1 being the eldest was managing the family properties on the demise of their father Dada Mulani. It was further stated that from 9/5/1972 all the three brothers were staying separately but the agricultural lands which they had inherited from their father were being cultivated jointly. He further alleged that on 9/7/1972 some signatures were obtained on blank papers by the defendant no.1 and fictitious documents were prepared on 27/7/1972 and 29/7/1972 pointing out that the plaintiff had sold his share to the defendant no.1. He claimed that Mutation Entry No.9621 was entered and effected by the Talathi in favour of the defendant no.1 and on the basis of said change his possession over the

1/3rd share was being obstructed by the defendants.

. Defendant no.1 filed his W.S. at Exhibit 33 and subsequently Defendant Nos.1A to 1E by adopting the said WS by filing pursis at Exhibit 101 had opposed the suit. After hearing both the parties and considering the evidence adduced by them the learned Jt. Civil Judge Junior Division at Waduj by his judgment and order dated 10/10/1994 was pleased to dismiss the suit. Subsequently the plaintiff filed Regular Civil Appeal No.630 of 1994 which has been allowed as mentioned earlier.

. Mr.Bodake, the learned counsel for the appellant - original defendant no.1 pointed out at the first instance that the impugned decree is passed by the lower Appellate Court when the sole appellant-plaintiff was not alive and though survived by the present respondent nos.1A to 1E, they were not brought on record as the appellants. On 20/4/2005 when this Second Appeal was heard, these submissions made by Mr.Bodake were recorded in the order passed on the same day and it was further noted that the original plaintiff died on 20/11/1995 and an application was made on 30/3/1996 at Exhibit 18 for

bringing on record the LRs of the plaintiff-appellant in the first Appellate Court. Though an order was passed on this application at Exhibit 18 directing the respondents to file say, however, no formal order was passed allowing the application and consequently the present appellant nos.1A to 1E could not be brought on record before the lower Appellate Court and this appeal came to be decided when actually it had either abated and no order was passed on Exhibit 18 so as to bring on record the LRs of the sole appellant, if such an application was filed in time. Being aware of this factual position before the lower Appellate Court, the learned counsel for the original plaintiff has addressed a communication to the learned counsel for the appellants that in the obtaining facts of this case remand would be proper and would serve the interest of both the parties so that on remand the application at Exhibit 18 is decided at the earliest possible and subsequently Regular Civil Appeal No.630 of 1994 could also be decided as per law.

. It would be, therefore, necessary that this second appeal is allowed by setting aside the impugned decree and Regular Civil Appeal No.630 of

1994 is restored and remanded for fresh decision on merits.

. Hence, this appeal is allowed partly and the impugned decree passed by the lower Appellate Court in Regular Civil Appeal No.630 of 1994 is hereby quashed and set aside and the said appeal is restored to the file of the learned 3rd Additional District Judge at Satara. It is directed that application at Exhibit 18 filed in the said appeal be decided as per law within two weeks from the date of appearance of the parties before the lower Appellate Court. In addition if the appellant - plaintiff has knowledge that any of the other respondents is not alive as at present, the appellant shall take appropriate steps to bring such respondent's LRs on record and such application shall be presented before the lower Appellate Court on the date fixed for appearance. Parties to appear before the lower Appellate Court on 30th April 2007. It is directed that Regular Civil Appeal No.630 of 1994 on its remand shall be heard from the stage of deciding the application at Exhibit 18 or such other applications filed to bring the LRs of any other deceased respondents on record and decided as per law finally as expeditiously as

possible and preferably by 31st July 2007.

. Civil Application No.880 of of 2002 does not survive and the same stands disposed.

. Writ to go to the lower Appellate Court forthwith.

(B.H.MARL